Supreme Court, U. S.
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No.

In the Supreme Court of the United States

OCTOBER TERM—1976

76-915

LEONARD PATRICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on September 23, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has been reported at 542 F.2d 381 (7th Cir. 1976). This opinion and the denial of the petition for rehearing *en banc* are printed in full as an appendix hereto.

JURISDICTION

The opinion of the Court of Appeals was entered on September 23, 1976. A timely petition for rehearing *en banc* was filed by the petitioner, but such petition was denied on November 30, 1976. A motion for stay of mandate pursuant to Rule 41, Federal Rules of Appellate Procedure, was timely filed with the Court of Appeals. This motion, however, was denied by the United States Court of Appeals for the Seventh Circuit on December 7, 1976. A motion pursuant to Rule 51, Supreme Court Rules, for stay of mandate was subsequently filed with the Honorable William H. Rehnquist. This motion was denied on December 15, 1976. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1); 62 Stat. 928.

QUESTIONS PRESENTED

1. May a witness, granted use immunity pursuant to 18 U.S.C. Sections 6002-6003, nevertheless be charged with perjury under the mutually inconsistent material declarations provisions of Section 1623(c), Title 18, United States Code, if his resulting testimony is materially inconsistent with testimony given by him as a result of an earlier grant of use immunity?

2. At a jury trial to determine whether Petitioner's refusal to give testimony under a grant of immunity was contemptuous, and where it is conceded that the defendant had a sincere belief that his and his family's safety and well-being were being threatened if he did testify, was it error for the district court to withdraw the petitioner's defense of duress from the jury upon the court's own assessment that the threats were not immediate and that petitioner failed to take sufficient steps to avoid subjecting himself to the dangers presented by the threats?

3. Was the sentence of four years imprisonment imposed on Petitioner for failing and refusing to testify under a grant of immunity at the criminal trial of another excessive?

STATUTES INVOLVED

18 U.S.C. §1623 False Declarations before Grand Jury or Court

> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

18 U.S.C. §6002 Immunity generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. §6003 Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States District Court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination such order to become effective as provided in Section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT

On January 31, 1974, over objection and following earlier claims of privilege, Leonard Patrick was immunized and ordered to testify before the Special January, 1974, Grand Jury for the Northern District of Illinois. On February 6, 1974, Patrick appeared before the Grand Jury and, under compulsion of the immunity order, gave testimony concerning Ronald O'Hara, a Chicago police lieutenant.

Almost immediately after Patrick's appearance and testimony before the Grand Jury, a member of Patrick's family was visited by O'Hara, who directed that Patrick get in touch with him at once. The message was left that failure to do so would "involve" Patrick and his family. As a result of this incident, Patrick, obviously agitated, called on his attorney. He asked her to report the incident to the United States attorney, and, on her advice, left town for a while.

Subsequently, O'Hara again visited members of Patrick's family and impliedly cautioned them concerning further testimony by Patrick. Others had discussed with Patrick O'Hara's reputation as a killer, and, in this regard, Patrick cautioned his family to avoid all contacts with O'Hara. During the following period, numerous additional contacts took place, and Patrick became "very uptight and very shaky and very upset." There were nu-

merous contacts with Patrick's family members which specifically referred to the fact that Patrick's family might well "suffer" if Patrick was to give testimony.

Based on Patrick's compelled grand jury testimony, Ronald O'Hara was indicted on two counts of failing to report on his income tax returns money allegedly received from Patrick during the years 1968 and 1969. A third count charging a similar offense was based on evidence independent of that given by Patrick.

One month before his trial was scheduled to commence O'Hara again threatened Patrick's daughter: "Either I see your father before my case goes to trial or you are all going to suffer, and you tell him that, and tell him not to forget it." Patrick took his daughter to his attorney to report the threat.

On June 10, 1975, Patrick was again granted immunity pursuant to Sections 6002-6003 of Title 18, United States Code, and was called as the government's first witness in the trial of Ronald O'Hara. When asked questions relating to his association with O'Hara, Patrick refused to testify. Patrick was held in civil contempt and ordered incarcerated until such time as he purged himself of the contempt. On June 11, 1975, Patrick was again brought before the court, but again refused to testify. When the two counts against O'Hara based on Patrick's grand jury testimony were subsequently dismissed, Patrick was ordered released from incarceration and a rule to show cause was entered against him.

At his contempt trial, Patrick offered substantial testimony concerning the "visits" by O'Hara and the threats emanating therefrom. As a result of such testimony the Seventh Circuit specifically found that "the testimony presented . . . indicates a sincere belief on the part of

Patrick that O'Hara was a dangerous person who seemingly presented a threat to the safety and well-being of Patrick and his family." 542 F.2d at 387. Because of its obvious importance, an analysis of the testimony offered by Patrick at the contempt hearing is attached hereto as part of the Appendix. (App. C, *infra*) It is important to note that the government did not contest the accuracy of this testimony, but only its legal impact. Despite this testimony, the district court refused to submit the defense of duress or coercion to the jury, and this ruling was affirmed by the Seventh Circuit.

After withdrawing the defense of coercion from the jury's consideration, the case was submitted to the jury which subsequently returned a verdict of guilty. The district court subsequently imposed a sentence of four years imprisonment on the petitioner.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION THAT SECTION 1623(c) CANNOT BE USED TO PROSECUTE AN IMMUNIZED WITNESS WHO SUBSEQUENTLY CHANGES HIS TESTIMONY IN MATERIAL RESPECTS MISAPPREHENDS THE ROLE INTENDED FOR 1623(c) AS EVIDENCED BY ITS ENACTMENT AS PART OF THE ORGANIZED CRIME CONTROL ACT OF 1970.

The primary issue in this case is whether the immunity conferred on petitioner Patrick pursuant to the Federal "use immunity" statutes (18 U.S.C. §§ 6002-6003) prohibited the use of testimony compelled thereby in a subsequent prosecution for perjury under the inconsistent statements provision of 18 U.S.C. § 1623(c). Considering the extensive role of immunity in the current prosecutorial atmosphere and recognizing, as did the Seventh Circuit, that this issue is one of first impression, the question presented here is most important to the ongoing enforcement of Federal criminal law.

Section 1623(c) permits a prosecution where a witness under oath has knowingly made two or more declarations which are inconsistent to the degree that one of them is necessarily false. An indictment under such section "need not specify which declaration is false," and proof of the falsity of the declaration is sufficient solely on the establishment that the defendant has made irreconcilably contradictory declarations before any court or grand jury.

It is Patrick's contention that, despite his use immunity, he could still have been prosecuted under Section 1623(c), if his testimony at O'Hara's trial was materially inconsistent with his testimony before the grand jury. Patrick argued that, by permitting prosecution and conviction without particularization of the alleged false statement, and merely upon proof of mutually inconsistent statements, Section 1623(c), in effect, allows the statements to evince themselves, but does not require that they be *used* to prove the falsity, one of the other. Thus, the issue presented for review concerns whether Patrick had a right, absent a complete grant of transactional immunity at the O'Hara trial, to refuse to answer questions, not because his answers would have amounted to perjury, but because they may have provided evidence which could have been used to prosecute him for the nonspecific perjury described by Section 1623(c).

The Seventh Circuit rejected this argument, accepted the governments' concession that use of Section 1623(c) was barred by the use immunity granted, and concluded that the immunity statute prohibited the use of compelled testimony in any respect. *Kastigar* v. *United States,* 406 U.S. 441, 453 (1972). The panel arrived at this conclusion, even though it recognized that immunized testimony may properly be used "to establish the *corpus delicti* of the offense of perjury, i.e., proving the witness made the statement." 542 F.2d at 385. This latter conclusion would tend to support the petitioner's real fear, that is, the establishment of the *corpus delicti* of the inconsistent statement provisions of Section 1623(c). See *United States* v. *Hockenberry,* 477 F.2d 247, 249 (3rd Cir. 1973).

Thus, an important issue for this Court's consideration concerns the interpretation of the relationship between Section 1623(c) and the immunity statutes. All that ap-

parently is necessary under Section 1623(c) is that the *corpus delicti*, i.e., the uttering of the two inconsistent statements, be established. The prosecutor need not allege which statement is false and which true, nor need he prove which statement is false and which is true. Thus, in the limited area of Section 1623(c) prosecutions, the immunity statute allows on the one hand what it purports to forbid on the other. In doing so, it would appear that it fails to provide a witness with the protection coextensive with his Fifth Amendment rights. If this analysis is accurate, the immunity statute is unconstitutional at least in this limited application. *Counselmen* v. *Hitchcock*, 142 U.S. 547.

In addition, this issue merits examination by the Court in view of the fact that Section 1623(c) seems to have been designed, properly or not, to prevent just what the Seventh Circuit said it is now powerless to prevent, namely, change of testimony by an immunized witness. Both the immunity statute and Section 1623(c) were added to Title 18 as part of the Organized Crime Control Act of 1970. In practical application, it is Section 1623(c) which gives force to the immunity statute. This section seems clearly intended to meet those situations where the government has no proof of the witness's falsehoods other than the witness's own words. "To [interpret the statute as not applicable] would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korp.*, 322 U.S. 480, 489.

In *Scales* v. *United States*, 367 U.S. 203, the petitioner asked the Court to construe Section 4(f), of the Internal Security Act of 1950 (64 Stat. 987, 50 U.S.C. §§ 781, et seq.) as "a *pro tanto* repealer of the membership clause of the

Smith Act [18 U.S.C. § 2385], thereby assuring effective immunity from the criminal consequences of registration [as required by Section 4(f)]. . . ." 367 U.S. at 210. In short, Scales claimed that it was necessary to construe Section 4(f) as repealing the membership clause of the Smith Act in order to save the constitutionality of Section 4(f). The Court rejected this claim noting that, "if we accept the petitioner's argument that Section 4(f) must be read as a partial repealer of the membership clause, we would be led to the extraordinary conclusion that Congress also intended to immunize under Section 4(f) what it prohibited in these other subsections *which it passed at the same time.*" 367 U.S. at 211 (emphasis added). See also, *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511 note 9, 515; *Cameron* v. *Mullen*, 387 F.2d 193 (D.C. Circuit, 1967).

The Seventh Circuit found support for its position in two Illinois cases, *People* v. *Denson*, 59 Ill. 2d 546, 322 N.E. 2d 464 (1975), and *People* v. *Walker*, 28 Ill. 2d 585, 192 N.E. 2d 819 (1963), both of which viewed the problem presented here as it affected the Illinois *transactional* immunity statute. It would appear that *Denson* and *Walker* would support petitioner's position herein as opposed to the Seventh Circuit's conclusions. Mr. Justice Schaefer, speaking for the court in *Walker*, pointed out that the offense of perjury by inconsistent statements, also punishable in Illinois (38 Ill. Rev. Stat. Section 32-3), "was shown 'in whole or part' by the testimony that [the witness] gave under the statutory grant of [transactional] immunity." 192 N.E. 2d at 823 (emphasis added). Thus, the Illinois transactional statute protected the witness from precisely the problem faced by Patrick, because it forbade prosecution for any offense *shown* "in whole or part" by the immunized testimony.

Federal use immunity does not operate in this manner. Use immunity does not proscribe prosecution for offenses revealed by the immunized testimony. The difference between the two types of immunity statutes clearly describes the dilemma faced by Patrick in this case. Because the offense of inconsistent statements is revealed as soon as the second statement is made, the offense cannot be prosecuted in any manner as long as the witness has been given transactional immunity, but can be prosecuted under the interpretation of the use immunity statutes rejected by the Seventh Circuit.

Because of the increasingly frequent role played by the use immunity statute in the federal criminal justice system, it is of substantial importance that this question as to the companion role played by Section 1623(c) be decided by the Supreme Court.

II.

THE REMOVAL FROM THE JURY'S CONSIDERATION OF PATRICK'S DEFENSE OF DURESS AND COERCION HAS ESTABLISHED A DEFINITE MEANS OF CIRCUMVENTION OF A DEFENDANT'S FUNDAMENTAL RIGHT TO TRIAL BY JURY.

The district court and the Seventh Circuit have agreed that the trial judge had a threshold responsibility of determining the adequacy of proof as to the elements of the duress defense. Thus, if the district court was not satisfied as to the immediacy of the threats or the sufficiency of the steps taken to prevent the apparent danger, he was warranted in refusing to submit the issue of duress to the jury.

It is Petitioner's position that questions concerning the immediacy of danger and the opportunity to prevent that danger involve subjective rather than objective considerations and, as such, are proper for the jury's determination. Thus, the jury should have been left to decide, from evidence of O'Hara's continued visits and threats, up to a month before his trial was scheduled to commence, whether the "immediacy" element of the duress defense had been established to their satisfaction. Similarly, the jury should have been allowed to decide, from evidence of Patrick's complaint to his attorney about O'Hara's last visit within a month before the O'Hara trial, whether the preventive element had been satisfactorily established.

The "imminent" test adopted by the Seventh Circuit would apparently require some actual physical harm befalling Patrick before such a defense could be considered by the jury. This is apparently so because the Seventh Circuit specifically found "that the testimony presented . . . indicates a sincere belief on the part of Patrick that O'Hara was a dangerous person who seemingly presented a threat to the safety and well-being of Patrick and his family."

The opinion by the Seventh Circuit appears to be in conflict with the decisions of other courts which have taken the view that: "Whether any of the conditions requisite to this defense exist is a question of fact to be decided by the trier of fact after taking into consideration all the surrounding circumstances." *People* v. *Lovercamp,* 43 Cal. App. 3d 823, 118 Cal. Rptr. 110, 116 (1974); see also, *People* v. *Harmon,* 394 Mich. 625, 232 N.W.2d 187 (1975); *People* v. *Luther,* 394 Mich. 619, 232 N.W.2d 184 (1975); see also, *e.g., Griego* v. *United States,* 298 F.2d 845, 849 (10th Cir. 1962); *United States* v. *Garner,* 529 F.2d 962 (6th Cir. 1976).

The removal of the duress defense from the jury's consideration not only raises a significant question of the role to be played by juries in contempt cases, but it also raises fundamental questions concerning a defendant's right to trial by jury. As it was not Patrick's burden to prove duress beyond a reasonable doubt, but only to produce sufficient evidence for the jury to consider whether the government had proved its case beyond a reasonable doubt, traditional principles concerning the roles of judge and jury should have been followed. See, e.g., *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U.S. 395; *Schwachter* v. *United States,* 237 F.2d 640 (6th Cir. 1956). A decision by this Court in this area is especially desirable in view of the increasing number of cases raising the defense of "duress." E.g., *United States* v. *McClain,* 531 F.2d 431 (9th Cir. 1976); *United States* v. *Gordon,* 526 F.2d 406 (9th Cir. 1975); *United States* v. *Nickels,* 502 F.2d 1173 (7th Cir. 1974).

III.

THE SENTENCE OF FOUR YEARS IMPRISONMENT IMPOSED ON PATRICK FOR FAILING AND REFUSING TO TESTIFY AFTER A GRANT OF USE IMMUNITY EXCEEDS THE TRADITIONAL LIMITATION THAT THE CONTEMPT POWER SHOULD BE EXERCISED TO THE "LEAST POSSIBLE POWER TO THE END PROPOSED," AND OTHER LIMITATIONS SUGGESTED BY THE STATUTES AND PRIOR DECISIONS.

Despite its conclusions that the evidence indicated a "sincere belief on the part of Patrick that O'Hara was a dangerous person who seemingly presented a threat to the safety and well-being of Patrick and his family", the Seventh Circuit concluded that the sentence of four years

imposed on Patrick was not an abuse of discretion. This sentence appears to be the longest yet imposed by a federal court for the criminal contempt of failing and refusing to testify subsequent to a grant of immunity.

Since *Anderson* v. *Dunn,* 19 U.S. (6 Wheat.) 204 (1821), the judiciary has been admonished by the Supreme Court that the contempt power must be exercised to the "least possible power adequate to the end proposed." 19 U.S. at 231. What the district court has done, and the Court of Appeals has sanctioned, is the practical equivalent of equating Patrick's passive conduct to an affirmative act of perjury.[1] To liken Patrick's conduct to the crime of perjury, ignores the substantial factual and legal issues directly and forthrightly raised by Patrick in challenge to the immunity conferred upon him.

In view of the extraordinary length of this sentence issued pursuant to a contempt citation, it is respectfully urged that this Court review the scope of sentences in the criminal contempt proceedings and set forth definite guidelines for the district courts. *Bloom* v. *Illinois,* 391 U.S. 194 (1968).

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[1] Patrick claimed in the Court below that the district judge improperly considered Patrick's immunized Grand Jury testimony in sentencing him. It was not revealed until sentencing that the district judge had read the grand jury testimony during the O'Hara trial. In sum, the district judge concluded from his reading of this testimony that Patrick was an avid witness who "took charge of the Grand Jury to make serious accusations against Lt. O'Hara." He further concluded that Patrick's refusal to testify at the O'Hara trial was an attempt to evade cross-examination and protect himself from a possible perjury prosecution. (Tr. 10/22/75, pp. 12, 14, 19-20, 23-5)

CONCLUSION

For the foregoing reasons, this Petition For Certiorari To The United States Court Of Appeals For The Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-2014

UNITED STATES OF AMERICA,

Petitioner-Appellee

v.

LEONARD PATRICK,

Respondent-Appellant

Appeal from the United States District Court for the Northern District of Illinois, No. 75-CR-397
PRENTICE H. MARSHALL, *Judge*

Argued April 14, 1976—Decided September 23, 1976

Before HASTINGS, *Senior Circuit Judge*, TONE, *Circuit Judge*, and NOLAND, *District Judge*.*

NOLAND, *District Judge*. This appeal arises from appellant Leonard Patrick's conviction of the charge of criminal contempt of court, pursuant to 18 U.S.C. §401 [1]

* Honorable James E. Noland of the United States District Court for the Southern District of Indiana is sitting by designation.

[1] Such section provides in relevant part as follows:

§401 Power of Court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

and Rule 42 of the Federal Rules of Criminal Procedure. Patrick was found guilty after a trial by jury for his refusal to obey a court order directing him to answer questions during the course of a criminal trial in which he had been granted immunity under 18 U.S.C. §§6002-6003 in exchange for his testimony. Upon his conviction Patrick was sentenced to a term of four years. We affirm the conviction below.

I.

The record herein discloses that on January 31, 1974, Patrick was granted immunity pursuant to 18 U.S.C. §§6002-6003 and ordered to testify before the Special January 1974 Grand Jury for the Northern District of Illinois. On two prior occasions Patrick had appeared before the grand jury but had refused to testify on the basis of his Fifth Amendment privilege against self-incrimination. After receiving immunity Patrick appeared before the grand jury on February 6, 1974, and gave testimony concerning his knowledge of gambling activities in the Chicago area and his past relationship with Lieutenant Ronald O'Hara of the Chicago Police Department. Patrick also testified before the grand jury on February 27, 1974, and December 17, 1974, concerning the same inquiry. Primarily as a result of Patrick's testimony, O'Hara was charged in January 1975, under a three-count indictment, two of which counts alleged that O'Hara had failed to report money received from Patrick on his 1968 and 1969 federal income tax returns.

The O'Hara trial commenced on June 9, 1975, before Judge Marshall in the United States District Court for the Northern District of Illinois. Prior to his being called to the stand on June 10, 1975, as the government's first witness, Patrick was again granted immunity pursuant to 18 U.S.C. §§6002-6003 for any testimony he might give

at such trial. The court then ordered Patrick to testify and advised him that no testimony compelled under such immunity order could be used against him in any criminal case, except for a prosecution for perjury, giving a false statement, or otherwise failing to comply with the court's order under §§6002-6003.

After being duly sworn as a witness, Patrick stated his name and that he resided in Chicago but refused to answer any questions concerning his connection with gambling activities during 1968-1969 and of his relationship with O'Hara during those years. Patrick consistently justified his refusal to answer such questions by stating:

> "I respectfully decline to answer on the ground that my answer may tend to incriminate me and on any other ground presented or to be presented by my counsel."

Upon further inquiry by the court and a re-reading of the immunity order, Patrick stated that he understood the order but he continued to refuse to answer the government's questions. The court then found Patrick to be in civil contempt and remanded him to the custody of the United States Marshal.

On June 11, 1975, Patrick was returned to court and given a chance to purge himself of civil contempt and avoid further prosecution for criminal contempt. Again Patrick was advised of the immunity order entered by the court but he continued to assert the same objections and refused to answer the government's questions. Patrick was again held pursuant to the civil contempt order and a petition was filed for a rule to show cause why Patrick should not be held in criminal contempt, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. Trial was thereafter held upon Patrick's plea of not guilty, and upon conviction he was sentenced to a term of four years.

II.

The first issue raised by Patrick is whether immunity conferred pursuant to 18 U.S.C. §§6002-6003 prohibits the use of the compelled testimony in an "inconsistent declarations" prosecution under 18 U.S.C. §1623(c) [2] and is, therefore, co-extensive with the privilege against self-incrimination under the Fifth Amendment. Patrick argues that notwithstanding his immunization prior to testifying before the grand jury and again prior to being called as a witness in the O'Hara trial, he still could have been prosecuted under §1623(c) if his testimony at trial was materially inconsistent with his testimony before the

[2] Section 1623 was enacted as part of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 932, and provides in pertinent part as follows:

> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—(1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made such declaration believed the declaration was true.

grand jury.[3] Therefore, Patrick alleges his assertion of the privilege against self-incrimination was proper and that the court erred in denying his motion to dismiss the order to show cause on such ground. The government responds that Patrick's immunity would extend to protection from prosecution under §1623(c) because the use of any immunized testimony to demonstrate Patrick's having made inconsistent declarations would be forbidden by the immunity statute as interpreted in *Kastigar* v. *United States,* 406 U.S. 441 (1972).

Our research has uncovered no cases which clearly resolve the particular challenge brought herein to §§6002-6003 immunity. It is well settled, however, that the grant of use and derivative use immunity under §§6002-6003 is co-extensive with the Fifth Amendment privilege against self-incrimination, *Kastigar* v. *United States, supra,* 406 U.S. at 453; *United States* v. *Cappetto,* 502 F.2d 1351, 1359 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975), and that the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect,"

[3] The distinguishing feature of a §1623(c) prosecution is that the government need only demonstrate that the defendant made two or more declarations under oath which were material to the issue in question and were inconsistent to the degree that one of them is necessarily false. The government need not allege nor prove which declaration was in fact false. The primary purpose of this section was to avoid the "two witnesses" rule of perjury prosecutions which demands that the falsity of a perjured statement be established by the testimony of two independent witnesses. *See* United States v. Gross, 375 F.Supp. 971, 975 (D. N.J. 1974), *aff'd* 511 F.2d 910, 914 (3rd Cir.), *cert. denied,* 423 U.S. 924 (1975); *see also* 1970 U.S. Code Cong. & Ad. News p. 4007.

This court has previously upheld the constitutionality of §1623. *See e.g.* United States v. Isaacs, 493 F.2d 1124, 1155-56 (7th Cir.), *cert. denied* 417 U.S. 976 (1974).

except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. *Kastigar* v. *United States, supra.* This latter qualification recognizes, for example, that if the witness commits perjury in giving the compelled testimony, the grant of immunity will not protect him from a perjury prosecution since no immunity attaches to false testimony given pursuant to the immunity order. *United States* v. *Tramunti,* 500 F.2d 1335, 1342-44 (2nd Cir. 1974).

Patrick primarily relies on the case of *United States* v. *Hockenberry,* 474 F.2d 247 (3rd Cir. 1973), which held that the immunity statute permits the introduction in evidence of so much of the witness' testimony as is essential to establish the *corpus delecti* of the offense of perjury, i.e., proving the witness made the statement. Patrick thus argues that it would not be improper for the government to use his immunized testimony in a §1623(c) prosecution merely for the purpose of establishing the *corpus delecti,* i.e., that he made the inconsistent declarations. Since the government would not have to prove which one of the two inconsistent declarations was false, the mere offering of proof that such declarations were made would establish the offense. While we agree with the court in *Hockenberry* that the witness' immunized testimony may be used to establish the fact that he committed perjury in the giving of such testimony, we do not agree with Patrick's assertion that such testimony could also be used to establish the *corpus delecti* of an inconsistent declarations prosecution. We believe such use was not intended by Congress to come within the exception found in §6002 that the compelled testimony may be used in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." As recognized by this Court in *United States* v. *Watkins,* 505 F.2d 545 (7th Cir. 1974), this exception refers only to "future" perjury, false statements or non-compliance with the court order. To interpret this perjury exception to include a prosecution under §1623(c) for inconsistent statements, some of which were made prior to the latest grant of immunity, would be too broad of a reading of §6002.

The effect of inconsistent statements on immunity grants was discussed by the Illinois Supreme Court in the recent case of *People* v. *Denson,* 59 Ill. 2d 546, 322 N.E.2d 464 (1975). In *Denson* the witness was held in contempt for refusal to testify at trial despite her being granted immunity for such testimony. The witness refused to testify on Fifth Amendment grounds arguing that such compelled testimony could be used to show inconsistencies with her grand jury testimony and she therefore faced the possibility of prosecution under an inconsistent declarations provision of the state perjury statute.[4] The court in relying on the case of *People* v. *Walker,* 28 Ill. 2d 585, 192 N.E.2d 819 (1963), held that the testimony given under the immunity order could not be used to show inconsistencies with her grand jury testimony. Therefore, her refusal to testify was not justifiable on Fifth Amendment grounds.

Patrick attempts to distinguish the *Denson* holding on the basis that Illinois has a transactional immunity statute, as opposed to the use immunity statute applicable herein. We do not believe such distinction between the types of immunity afforded in the *Denson* case and under §§6002-6003 to be important. As recognized by the Illinois court in *Walker,* perjury by inconsistent statements must necessarily be shown through the use of the

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[4]Ill. Rev. Stat., 1961, Ch. 38, Section 32-3.

immunized testimony. We believe such use to be improper under *Kastigar* and that Congress intended immunity conferred under §6002 to extend to "inconsistent declarations" prosecutions under §1623(c).

We therefore conclude that §§6002-6003 does not allow use of the immunized testimony to establish the basis for prosecution under 18 U.S.C. §1623(c) and that Patrick's challenge to his immunity order on Fifth Amendment grounds was improper.

III.

Patrick next contends that sufficient evidence was presented in support of his asserted defense of duress to justify having such defense submitted to the jury. At the conclusion of the evidence the Judge ruled that insufficient evidence had been presented to support the defense, curtailed closing argument thereon, and refused to instruct the jury as to the defense.

The parties are in agreement that a defendant is entitled to have the jury consider any theory of defense which is supported by law and has some foundation in the evidence, even though such evidence may be weak, insufficient or of doubtful credibility. *United States* v. *Lehman,* 468 F.2d 93, 108 (7th Cir.), *cert. denied,* 409 U.S. 967 (1972); *United States* v. *Vole,* 435 F.2d 774, 776-77 (7th Cir. 1970). However, if the defendant fails to sustain his evidentiary burden the court is duty-bound not to instruct the jury on the defense. *United States* v. *Cullen,* 454 F.2d 386, 390 (7th Cir. 1971). Historically the courts have struggled in attempting to formulate a quantitative measure of the amount of evidence necessary to raise an issue for jury consideration, but it goes without saying

that the differing facts of each case make any meaningful comparisons almost impossible.

Before reviewing the evidence presented below in an attempt to determine whether Patrick satisfied his preliminary burden with respect to the defense of duress, we must initially identify the elements of such defense. In the recent case of *United States* v. *Nickels,* 502 F.2d 1173 (7th Cir. 1974), *cert. denied,* 96 S.Ct. 2237 (1976), this court was faced with a situation wherein the defendant had asserted duress as a defense to the charge of committing perjury before a grand jury. While agreeing that duress could be a defense to such a charge, the court held:

> "In any event, this Circuit follows the common law rules that duress is a defense only if the defendant reasonably feared immediate death or severe bodily injury which could be avoided only by committing the criminal act charged. *United States* v. *Stevison,* 471 F.2d 143, 147 (7th Cir. 1972), following *Shannon* v. *United States,* 76 F.2d 490, 493 (10th Cir. 1935)." 502 F.2d at 1177.

The Tenth Circuit in *Shannon* v. *United States, supra,* similarly enunciated the test as follows:

> "Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind is not entitled to an instruction submitting that question to the jury." 76 F.2d at 493.[5]

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[5] Cited with approval by this court in United States v. Cullen, *supra,* 454 F.2d at 391 n. 12.

Without attempting to fully recount the testimony presented in support of the defense of duress, we will attempt to summarize the evidence which Patrick relies upon to justify his refusal to answer questions at the O'Hara trial. It is undisputed that, beginning immediately after Patrick's first immunized grand jury appearance O'Hara made several visits to the Patrick home in an attempt to communicate with Patrick. On February 9, 1974, three days after Patrick's initial immunized appearance before the grand jury, O'Hara appeared at the home of Patrick's daughter, ex-wife, and aunts.[6] When informed that Patrick was not at home, O'Hara asked one of Patrick's aunts to tell Patrick to get in touch with him as soon as possible. O'Hara further stated, "It's very important that I see him because it don't only involve him, it involves his family, too." When Patrick was informed of O'Hara's visit he told his family that O'Hara was dangerous[7] and that they should not answer the door. The evidence suggests that Patrick was very concerned and upset about O'Hara's visit and that he contacted his attorney, who thereafter advised Patrick to leave town for the time being. Patrick's attorney contacted the United States Attorney's office and asked that O'Hara be kept away from Patrick. Patrick's attorney refused a government offer to provide protection for Patrick upon the belief Patrick would not have wanted such protection, and also upon the belief that the offer was not bona fide.

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[6] Although Patrick did not actually live at this house, he visited there daily and was in constant communication with his daughter. This house will be generally referred to as Patrick's home.

[7] Patrick presented testimony to the effect that O'Hara had a reputation for being a killer and quite dangerous. Patrick also suggested that although he was aware that grand jury proceedings are to be secret, O'Hara had ways of finding out the extent of Patrick's testimony.

Approximately one week later O'Hara made another visit to the Patrick home and again explained that he must get in touch with Patrick. At his February 27, 1974, appearance before the grand jury, Patrick testified that O'Hara had visited his home and he also gave information he had concerning the basis for O'Hara's reputation as a killer. However, Patrick did not advise the grand jury of the alleged threats made by O'Hara. Shortly thereafter O'Hara again came to the Patrick home but Patrick refused to answer the door. Late in the fall of 1974 O'Hara again came to the Patrick home. When informed that Patrick was not at home, O'Hara allegedly became upset and said that Patrick had better get in touch with him or ". . . there is going to be a lot of heartache for all of you."

Patrick again testified before the grand jury on December 17, 1974, and O'Hara was indicted in January 1975. During the following May, O'Hara came to the Patrick home and, upon being advised Patrick was not there, told Patrick's daughter: "Either I see your father before my case goes to trial or you are all going to suffer, and you tell him not to forget it." Upon being informed of O'Hara's recent visit and message, Patrick advised his attorney that he was not anxious to testify against O'Hara. Upon being subpoenaed to testify at the O'Hara trial on June 10, 1975, Patrick refused to answer questions pertaining to O'Hara.

We should initially point out that the testimony presented by Patrick and others in his behalf indicate a sincere belief on the part of Patrick that O'Hara was a dangerous person who seemingly presented a threat to the safety and well-being of Patrick and his family. Patrick asserts that he was very much afraid of O'Hara and that this fear carried over into the lives of his family

and friends. We must point out, however, that fear, by itself, will not legally justify or excuse a witness' refusal to testify in violation of a court order. *Piemonte* v. *United States,* 367 U.S. 556, 559 n. 2 (1961); *United States* v. *Leyva,* 513 F.2d 774, 790 (5th Cir. 1975). Before Patrick is entitled to have the jury consider O'Hara's actions as a defense to his refusal to obey the court's order, he must present evidence on all of the elements of the defense of duress.

As the cases cited earlier indicate, the element of immediacy is of crucial importance in any attempt to raise duress as a defense to criminal charge. Although evidence was presented demonstrating a reasonable apprehension of injury by Patrick as a result of O'Hara's threats, there is no evidence that such injury was present, immediate, or impending. In light of the fact that apparently no action was taken by O'Hara to carry out his threats of the past eighteen months, we believe Patrick failed to demonstrate the immediacy of his fear. The record fails to disclose any evidence that O'Hara made any attempt to contact Patrick from the time of his last visit to the Patrick home in May until the time his trial was to commence on June 9, 1975.

The court in the case of *R. I. Recreation Center* v. *Aetna Casualty & Surety Co.,* 177 F.2d 603 (1st Cir. 1949), in reaching the conclusion that no evidence had been presented on the defense of coercion, stated that "a veiled threat of future unspecified harm . . . is not the equivalent of an immediate threat of death or severe bodily injury." *Id.,* at 605. We believe such principle is applicable herein.

Additionally, it is our belief Patrick also failed to take the reasonable steps available in an attempt to extricate himself from the apparent danger. Although Patrick

warned his family of O'Hara's dangerous reputation and informed his attorney of the threats, at or near the commencement of the O'Hara trial he failed to take any measures to protect himself or his family from O'Hara. At the time of his refusal to obey the order to testify, we believe he had an affirmative duty to inform the goverment authorities and the court of the threats and of his reluctance to testify unless adequate safeguards were taken to protect himself and his family and prevent retaliation from O'Hara. At the time of his refusal to testify Patrick made no attempt to inform the court as to his fears, the basis therefor, and the steps he had taken to alleviate the alleged danger so that he might comply with the law.

As recognized in *Shannon* v. *United States, supra,* one who has an opportunity to avoid violating the law without subjecting himself to immediate danger may not assert such threats as a defense and is not entitled to an instruction submitting such defense to the jury. 76 F.2d at 493. Under the circumstances of his case, we believe that as a matter of law Patrick failed to take sufficient steps to avoid subjecting himself to the alleged danger without disobeying the order to testify.

The public is entitled to any man's evidence concerning criminal acts committed by another. *Piemonte* v. *United States, supra,* 367 U.S. at 559. The entire criminal justice process could be rendered inoperable if a witness with evidence concerning a crime could refuse to provide such evidence based on a few vague threats of reprisal made during the eighteen month period of time preceding the witness' appearance in court.

Because we believe that Patrick failed to present evidence as to the immediacy of the danger to which he and his family were subjected or that he had no other oppor-

tunity to obey the court's order without subjecting himself to such danger, the court below did not err in withdrawing the defense of duress from the jury's consideration.

IV.

Patrick next argues the court erred in instructing the jury as to the "willfulness" element of criminal contempt. Concerning this element of the offense the jury was instructed as follows:

> "An act or failure to act is 'willfully' done if done voluntarily and intentionally, and with the specific intent to fail to do something the law requires to be done; that is to say, with the purpose either to disobey or disregard the law."

The only distinction between the instruction given and the one tendered by Patrick was the omission of the word "bad" just preceding the word "purpose." Similarly, except for that slight modification, the instruction given is identical to the standard instruction on willfulness. See Devitt and Blackmar, *Federal Jury Practice and Instructions,* §16.14 and cases cited therein. Patrick argues that his motive in this case is crucial and therefore that "bad purpose" is a necessary element of the willfulness instruction.

It is axiomatic that in determining the propriety of instructions they are to be viewed as a whole. *United States* v. *Brown,* 518 F.2d 821, 826 (7th Cir.), *cert. denied* 423 U.S. 917 (1975); *United States* v. *Johnson,* 515 F.2d 730, 732-33 n. 7 (7th Cir. 1975). As long as the instructions treat the issues fairly and adequately they will not be interfered with on appeal. *United States* v. *Isaacs,* 493 F.2d 1124, 1163 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974). The instructions given herein properly advised

the jury that in order for Patrick to be found guilty of criminal contempt they had to find that he acted with specific intent and that he intentionally failed to testify as he was directed to do. Regardless of Patrick's motive for his refusal to testify,[8] as long as such refusal was volitional and done with the awareness it was wrongful, the degree of intent necessary for a conviction was established. *United States* v. *Seale,* 461 F.2d 345, 368 (7th Cir. 1972).

Other courts have held that the words "bad purpose" are not a mandatory element of a jury charge defining wilfulness. *See e.g., Cooley* v. *United States,* 501 F.2d 1249 (9th Cir. 1974), *cert. denied,* 419 U.S. 1123 (1975); *United States* v. *Malinowski,* 472 F.2d 850, 855 (3rd Cir.), *cert. denied,* 411 U.S. 970 (1973). In viewing the instruc-

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[8] In the case of United States v. Cullen, 454 F.2d 386 (7th Cir. 1971), which involved a prosecution for the willful destruction of public records, this court discussed the problem of equating motive with intent and stated:

> In a case such as this, if the proof discloses that the prohibited act was voluntary, and that the defendant actually knew, or reasonably should have known, that it was a public wrong, the burden of proving the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue. 454 F.2d at 392.

Similarly, the Fourth Circuit stated as follows in the case of United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied,* 397 U.S. 910 (1970):

> To read the term "willfully" to require a bad purpose would be to confuse the concept of intent with that of motive. The statutory requirement of willfulness is satisfied if the accused acted intentionally, with knowledge that he was breaching the statute . . . [W]hatever motive may have led them to do the act is not relevant to the question of the violation of the statute, but is rather an element proper for the judge's consideration in sentencing. 417 F.2d at 1004.

tions given herein, we believe the jury was properly advised that the crime of criminal contempt requires a specific intent to consciously disregard an order of the court. In light of the insufficiency of evidence to support the defense of duress, the Judge acted properly in restricting Patrick's attempt to argue his motive for refusing to testify as ordered. We find no error in the instructions as given below.

V.

With regard to Patrick's contention that the District Judge should have disqualified himself *sua sponte* in this cause, Patrick alleges the Judge's reading and consideration of his grand jury testimony caused the Judge to form such an adverse personal opinion of Patrick that it was incumbent upon him to have disqualified herein.

The record reflects that Judge Marshall did afford Patrick an opportunity to request trial before another judge but such opportunity was not accepted. Similarly, at no time during the proceedings below did Patrick advise the court of any desire for a different judge or of any dissatisfaction with his impartiality.[9] Patrick argues, however, that such bias did not become apparent until the sentencing proceedings when the Judge advised Patrick that he had read the transcripts of his grand jury testimony and was distressed at his open refusal to testify in a similar manner at the O'Hara trial.

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[9] If Patrick had made a verified motion for a change of judge pursuant to 28 U.S.C. §144 alleging facts sufficient to show bias, Judge Marshall would have been required to grant such motion even though he believed the allegations therein to be false. Berger v. United States, 255 U.S. 22, 35-36 (1921); United States v. Sciuto, 531 F.2d 842, 845 (7th Cir. 1976).

The law is well settled that one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification. *Satterfield* v. *Edenton-Chowan Board of Education,* 530 F.2d 567, 574-75 (4th Cir. 1975); *Duplan Corporation* v. *Deering Milliken, Inc.,* 400 F.Supp. 497, 505-06 (D.S.C. 1975); *Hall* v. *Burkett,* 391 F.Supp. 237, 241 (W.D. Okl. 1975). We believe it was incumbent upon Patrick to have raised his contentions concerning any bias on the part of Judge Marshall as soon as the basis for such a belief surfaced during the sentencing proceedings. Such objection would have allowed the Judge an opportunity to respond to Patrick's present allegation.

In the recent case of *United States* v. *Jeffers,* 532 F.2d 1101 (7th Cir. 1976), this court discussed many of the cases in which a defendant has argued the judge was improperly biased by reason of some prior judicial connection with the defendant. Therein the principle was recognized the judge is presumed to be impartial and it was further noted that unless facts are presented alleging "personal" as opposed to "judicial" bias, the judge need not recuse himself. *Id.* at 1112; see also *United States* v. *Mitchell,* 377 F. Supp. 1312, 1320 (D.D.C. 1974), *aff'd. sub nom. Mitchell* v. *Sirica,* 502 F.2d 375 (D.C. Cir. 1974), *cert. denied,* 418 U.S. 955 (1974).

Under 28 U.S.C. §455(b)(1) the judge is to disqualify himself "[W]here he has a personal bias or prejudice concerning a party, . . ." It has been held that under this statute such decision "is a matter confined to the consideration and discretion of the judge himself." *Shadid* v. *Oklahoma City,* 494 F.2d 1267, 1268 (10th Cir. 1974). In the case of *United States* v. *Seiffert,* 501 F.2d 974 (5th Cir. 1974), it was recognized that merely prior knowledge

by the judge of facts concerning a party is not in itself sufficient to require disqualification. *Id.* at 978. Moreover, facts learned by a judge in his judicial capacity cannot be the basis for disqualification. *United States* v. *Bernstein,* 533 F.2d 775, 785 (2d Cir. 1976).[10]

It appears that the Judge's initial exposure to the grand jury testimony occurred upon Patrick's refusal to testify during the course of the O'Hara trial. However, Patrick himself made use of his grand jury testimony at his own trial by offering into evidence a transcript of the testimony of February 27, 1974, and December 17, 1974, and in questioning various witnesses therefrom in order to support his defense. We believe that in light of the principles recognized in *Jeffers* and the entire circumstances of the proceedings below, the Judge's exposure to Patrick's grand jury testimony does not establish improper bias herein and the Judge did not err in presiding over the trial and sentencing proceedings below.

VI.

In a claim similar to the one raised immediately above, Patrick next argues that the Judge's consideration of his grand jury testimony in imposing the sentence herein was an impermissible use of immunized testimony. The record reflects that at the sentencing proceedings below the Judge indicated to Patrick he had read the transcripts of his grand jury testimony and had come to the conclusion that

[10] In Bernstein the court said:

> The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification. 533 F.2d at 785.

Counsel for Patrick disagreed with the Judge's analysis of the grand jury proceedings but made no objection as to his having read Patrick's testimony. After further discussion, sentence was imposed. Patrick argues that use of immunized testimony in determining the severity of punishment violates the clear command of *Kastigar* that such testimony not be used against a witness "in any respect." *Kastigar* v. *United States, supra,* 406 U.S. at 453.

The government responds by citing many cases stating that the grant of immunity precludes any assertion by the witness of his Fifth Amendment privilege. See *e.g. Maness* v. *Meyers,* 419 U.S. 449, 462 n. 10 (1975); *In Re Michaelson,* 511 F.2d 882, 889-90 (9th Cir.), *cert. denied,* 421 U.S. 978 (1975). It argues the privilege against self-incrimination extends only to testimony which could subject the witness to *criminal prosecution* and does not protect him once criminality has been established by a conviction.[11]

[11] The government relies primarily on the case of United States v. Swift, 186 F. 1002, 1011, 1017-18 (N.D. Ill. 1911) and other cases discussed therein. *See also* Marcus v. Meyers, *supra,* wherein the Supreme Court stated:

> This Court has always broadly construed its [Fifth Amendment privilege] protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. (Citations omitted). The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence which an individual reasonably believes could be used against him in a criminal prosecution. 419 U.S. at 461.

The government also relies on cases recognizing the very broad discretion the judge possesses as to the type of information he may use in sentencing, *see, e.g.,* United States v. Tucker, 404 U.S. 443, 447 (1972); United States v. Marines, 535 F.2d 552, 554 (10th Cir. 1976); United States v. Johnson, 507 F.2d 826, 828-30 (7th Cir. 1974), *cert. denied,* 421 U.S. 949 (1975), and analogies by citing

(Footnote continued)

Therefore, the government contends any consideration by Judge Marshall of Patrick's grand jury testimony was not improper since such testimony was not used as evidence either to prosecute or convict him.

We believe the case of *United States* v. *Wilson,* 488 F.2d 1231 (2nd Cir. 1973), *rev'd on other grounds,* 421 U.S. 309 (1975), is of help in resolving the present claim of Patrick. In *Wilson,* the appellants had been convicted of criminal contempt for refusing to testify at the trial of an accomplice, despite their having been immunized pursuant to 18 U.S.C. §§6002-6003. At the time of their refusal to testify the appellants had not yet been finally sentenced on their own guilty pleas and they argued that any admission by them of the details of the robbery might weigh against them at their own sentencing. Since the judge presiding over the accomplice's trial was also going to impose sentence upon appellant Wilson, Wilson contended the danger of adverse use of the compelled testimony at sentencing precluded his grant of immunity from being co-extensive with his Fifth Amendment privilege. The Second Circuit held that the appellants had failed to properly preserve the issue for appeal and did not resolve whether the potential use of the compelled testimony in sentencing would be forbidden. 488 F.2d at 1233 n. 5. The Court rejected appellant's arguments by stating as follows:

(Footnote continued)

various cases which hold that for sentencing purposes a judge may consider evidence obtained in violation of the defendant's rights under the Fourth Amendment, provided the illegally seized evidence was not gathered for the purpose of improperly influencing the defendant's sentencing. *See, e.g.,* United States v. Schipani, 435 F.2d 26, 28 (2nd Cir. 1970), *cert. denied,* 401 U.S. 983 (1971); Verdugo v. United States, 402 F.2d 599, 610-12 (9th Cir. 1968), *cert. denied,* 402 U.S. 961 (1971).

> "But neither Wilson nor Bryan followed what we deemed [sic] to be proper procedure in raising the issue of 'forbidden use.' If appellant Wilson doubted the ability of Judge Lasker to put out of his mind Wilson's statements at Anderson's trial, he should nevertheless have testified as ordered, but requested a different judge for sentencing on the robbery charge. Similarly, if Bryan genuinely feared an increased sentence on his guilty plea as a result of testifying in the *Anderson* case, he, too, should have given the evidence, then asked that proper precautions be taken (e.g., sealing the record) to insure that Judge Cooper would not be privy to the statements made under grant of immunity. Both were, however, required to obey the mandate of 18 U.S.C. §6002 that 'the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination . . .'" 488 F.2d at 1233 (Citations and footnotes omitted)

Although the *Wilson* case was later reversed by the Supreme Court on other grounds, the issue of whether the possible use of compelled testimony in sentencing is forbidden by *Kastigar* and the Fifth Amendment was not presented to or resolved by the Court. 421 U.S. at 311-12 n. 3.

Although we agree with Patrick that the facts herein are distinguishable from those in *Wilson* in that Patrick was apparently unaware of the Judge's consideration of the grand jury testimony until the time of his sentencing, we believe the principle enunciated in *Wilson* in valid. Even if we assume the Judge's consideration of Patrick's grand jury testimony was improper, as soon as it became known to Patrick that such testimony had been considered in determining the sentence we believe Patrick had an obligation to take the proper steps to protect his rights. If he had sought a change of judge for sentencing purposes as

discussed in *Wilson,* either his Fifth Amendment privilege would have been protected or he would have properly preserved his claim for appeal.

Furthermore, as discussed above, Patrick should not be allowed to complain about the Judge's exposure to his grand jury testimony in light of his own use of portions thereof as a part of his defense. In light of the Second Circuit's holding in *Wilson,* and the circumstances under which Judge Marshall was exposed to the immunized testimony herein, we do not believe Patrick is now entitled to object to the use of such testimony in his sentencing.

VII.

As to the final issue of whether the four year sentence imposed herein was excessive, we must initially point out that neither 18 U.S.C. §401 nor Rule 42 of the Federal Rules of Criminal Procedure set forth a maximum sentence for criminal contempt. In light of the absence of such statutory limitation, the severity of the sentence to be imposed is within the sound discretion of the district court. *Green* v. *United States,* 356 U.S. 165, 188 (1958). While the Supreme Court has imposed upon the appellate courts the responsibility of insuring that this discretion is not abused, *Cheff* v. *Schnackenburg,* 384 U.S. 373, 380 (1966), great reliance is to be placed on the district court's decision. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 303 (1947); *United States* v. *Seale,* 461 F.2d 345, 355 (7th Cir. 1972).

Patrick argues since over half of the states have limited the imprisonment for criminal contempt to one year or less, see *Bloom* v. *Illinois,* 391 U.S. 194, 206-07 n. 8 (1968), and a witness who refuses to testify before a grand jury may not generally be imprisoned for more than eighteen months under 28 U.S.C. §1826, the sentencing discretion was abused in this case. Patrick also contends that even

if the testimony concerning O'Hara's threats do not legally excuse his refusal to testify at trial, such evidence should have justified a shorter sentence being imposed.

Although this court in appropriate cases has reduced or modified sentences imposed for criminal contempt,[12] we are unable to find the sentence imposed herein was an abuse of discretion. In the case of *United States* v. *Thompson,* 214 F.2d 545 (2nd Cir. 1954), the Second Circuit affirmed a sentence for criminal contempt of four years for the defendant's failure to respond to a surrender order. Similarly, in the case of *United States* v. *Sternman,* 433 F.2d 913 (6th Cir. 1970), the Sixth Circuit affirmed a sentence of three years for witness' refusal to testify before the grand jury. Furthermore, in attempting to compare Patrick's conduct herein with offenses other than criminal contempt, we find that the offenses of perjury[13] and obstruction of a criminal investigation[14] each provide for terms of imprisonment up to five years. In light of the above authority four years is not *per se* an excessive sentence for criminal contempt.

It must be emphasized that this case does not involve merely a witness' refusal to testify before a grand jury concerning his knowledge of criminal activity. Patrick made serious accusations before the grand jury concerning illegal conduct on the part of O'Hara, which testimony apparently was the primary basis for O'Hara's indictment,[15] but Patrick later refused to provide the same testi-

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[12] *See* United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970), *cert. denied,* 401 U.S. 911 (1971); United States *ex rel.* Robson v. Malone, 412 F.2d 848 (7th Cir. 1969).

[13] 18 U.S.C. §1621.

[14] 18 U.S.C. §1510.

[15] Apparently the two counts against O'Hara based on Patrick's testimony were dismissed by the government upon Patrick's refusal to testify at trial.

mony at O'Hara's trial. Where an individual has been indicted primarily as a result of a witness' grand jury testimony, the effects on the criminal justice system can be damaging when courts are not given the power to impose severe sanctions for subsequent contumacious conduct on the part of the witness. For example, if Patrick's accusations were false, he subjected O'Hara to a criminal indictment and its resulting expense and embarrassment without giving O'Hara the opportunity to confront such allegations and obtain the proper vindication. If, in fact, Patrick's allegations were true, he caused the fruitless expense of considerable time and energy by the government in initiating criminal charges against O'Hara as well as deprived the citizens of an opportunity to successfully prosecute an individual guilty of criminal conduct. We believe the punishment in a case such as this should be greater than in cases where a witness has merely refused to testify before a grand jury.

A reviewing court cannot normally determine from an appellate record the seriousness of a defendant's transgressions, *United States* v. *Seale, supra,* 461 F.2d at 355, and we conclude there is no basis for finding an abuse of the sentencing discretion herein.

Therefore, the judgment of the district court is hereby AFFIRMED.

A true copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
December 7, 1976.

Before
Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 75-2014 v.

LEONARD PATRICK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 CR 397
Judge Marshall

The opinion in this case was entered on September 23, 1976. Since that time the defendant-appellant requested and was granted thirty (30) days in which to file a motion for a rehearing in banc. This petition was subsequently denied on November 30, 1976.

The defendant-appellant was convicted of criminal contempt in a jury trial and this court gave thorough consideration to all the issues raised on appeal. We have concluded that this request for a stay of mandate is being made simply to avoid incarceration for the convicted appellant. Therefore,

IT IS ORDERED that the defendant-appellant's request for stay of mandate is hereby DENIED.

APPENDIX C

Factual Analysis of Evidence of Duress and Coercion

On February 6, 1974, Patrick appeared before the Grand Jury and, under compulsion of the immunity order, gave testimony concerning Ronald O'Hara, a Chicago Police lieutenant.

On the Saturday night following (Tr. 51, 55, 113), an unidentified man appeared at the home of Patrick's daughter, ex-wife and aunts.[1] The man asked Lillian DeChristopher, Patrick's 73-year old aunt, if Patrick was home. Upon her response that he was not, the man asked where he could get in touch with Patrick. When Mrs. DeChristopher replied she did not know, the man said: "It's very important that I see him because it don't only involve him, it involves his family, too." He then turned to leave, saying as he did so: "Tell Leonard when he gets home to get in touch with Ronnie O'Hara." After leaving the doorway, the man walked back and forth in front of house for a few minutes. (Tr. 52, 54)

Sharon Patrick, respondent's daughter, returned home from work shortly after this incident. Almost immediately after Sharon's arrival, Mrs. DeChristopher told her that O'Hara had been to the house looking for Patrick. She also told Sharon that O'Hara had said it was very important that he speak to Patrick and, if he did not, there would be "a lot of trouble for the whole family." (Tr.

[1] Patrick did not live at this home. However, he visited the home daily and was in constant communication with his daughter. (Tr. 51) This home is sometimes hereafter referred to as the "Patrick home."

113-14, 55, 57) Sharon immediately called her father, (Tr. 57, 114) She told him about her conversation with Lillian. Patrick responded that O'Hara was dangerous, that Sharon should not answer the door, and that he would talk to her later about the incident. (Tr. 114-15)

Patrick had earlier, at the end of 1973 or the beginning of 1974, had conversations concerning his appearances before the Grand Jury and O'Hara with Leonard Yaras. (Tr. 89-90) The initial conversation was prompted by Patrick's telling Yaras that O'Hara was being investigated by the federal government. When Patrick appeared puzzled by Yaras' response that he was glad to hear about the investigation, Yaras explained that O'Hara believed "he had a license to kill people because he had a badge." (Tr. 90-91) Patrick asked Yaras why he said this, and Yaras replied that he had been told by Joseph Russo that O'Hara had shot a man in the head on Russo's sister's front lawn after the man had been wounded and was laying on the lawn; when Russo's sister started to scream, O'Hara pointed his pistol at her and told her to get back in her house or he would blow her head off.[2] (Tr. 92) At this same time, Yaras told Patrick about an argument he had had with O'Hara in 1966.[3] (Tr. 93-4) When Yaras finished, Patrick told him he would not have believed these things if Yaras had not told him about them. (Tr. 95)

[2] Respondent offered to corroborate Yaras' testimony with testimony by Russo. (Tr. 62-8)

[3] Respondent also offered to prove, through Yaras, that he had told Patrick in 1974 about a 1966 altercation with O'Hara in which O'Hara reached for a pistol. (Tr. 125) The offer was rejected (Tr. 126; see Tr. 94), even though government counsel, during cross-examination, attempted to show the lack of basis for Yaras' communication to Patrick that O'Hara was a dangerous man. (Tr. 105)

At the end of January or beginning of February, 1974, Patrick told Yaras the Grand Jury had asked him questions about O'Hara and that he was "kind of distraught." Yaras told Patrick he would be "awfully careful about getting into anything concerning Mr. O'Hara because he might get hurt." (Tr. 95) Patrick said that his testimony before the Grand Jury was secret, and Yaras replied that O'Hara had a lot of friends and he would not doubt that Patrick's testimony would "leak back" to O'Hara. (Tr. 96)

Patrick went to his daughter's house on Sunday, February 10th, the day following O'Hara's initial visit. Lillian and Sharon again told Patrick what had happened the previous evening. (Tr. 57-8; 115) Patrick told his daughter not to open the door or talk to O'Hara in the future, and that he would talk to her later. At the time Patrick was "very upset, extremely upset, really nervous and upset, and you could hardly talk to him. He just didn't know what to do for us." (Tr. 115) Patrick left the house after this conversation. (Tr. 58, 60, 115)

Earlier that morning, Patrick had called Yaras. He was frantic and stuttering. He told Yaras to get over to his house and to bring a pistol with him, if he had one. Yaras drove to Patrick's house where he met Patrick, who came out as soon as Yaras pulled up. When Yaras asked Patrick what was wrong, Patrick replied that O'Hara had been to his home and had threatened his aunt, saying that "if he kept going, that Mr. Patrick and his family were all going to be in big trouble." (Tr. 97, 107) Patrick then directed Yaras to drive to the residence of Anna Lavin, Patrick's attorney. (Tr. 97-8)

Patrick had also called Miss Lavin earlier that morning, and had told her he had to see her right away. Miss

Lavin asked if the matter could wait until the following day, and Patrick said it could not, it was urgent. Miss Lavin then instructed Patrick to meet her at her apartment building. Patrick said he would be there in about ten minutes. (Tr. 129-30) When Patrick did not arrive in ten minutes, Miss Lavin went down to the lobby of her building where she saw Patrick and Yaras. Patrick appeared agitated. (Tr. 131) He wanted to move away from the lobby windows. (Tr. 99) At Miss Lavin's suggestion the three sat in the north end of the lobby. Patrick told Miss Lavin that O'Hara had been looking all over for him, and had finally come to his home the previous evening. Patrick also told Miss Lavin that O'Hara had said to Mrs. DeChristopher that he wanted Patrick to get in touch with him and something to the effect that "he better get in touch with me or he'll be sorry." (Tr. 131)

Miss Lavin told Patrick she would report the incident to the government, and Patrick concurred. Then, either Patrick said, or Miss Lavin suggested, that Patrick not go home in the meantime. Miss Lavin suggested that Patrick go to a motel. Patrick complained that O'Hara, with his police connections, could find him anyplace. Miss Lavin then suggested that Patrick leave the city and register under another name, to give her time to speak to the United States Attorney. (Tr. 132; 99-100) During the conversation Patrick complained that O'Hara had a right to carry a gun and he could not, that he (Patrick) had no way of protecting himself. It was this complaint which prompted Miss Lavin to suggest that Patrick stay in a motel. (Tr. 132-3, 99)

Miss Lavin then arranged for Patrick to call her at two o'clock the following day. (Tr. 132)

Yaras drove back to Patrick's apartment. On the way, Patrick asked Yaras to get the name of Russo's sister, her phone number and her address. When they arrived at Patrick's apartment, Yaras drove around the block to make sure no one was there, and he then pulled up on the front lawn. Patrick went directly into his apartment and returned in about fifteen minutes with his suitcase. (Tr. 100-101)

From the apartment, Yaras drove Patrick to the airport. On the way, Patrick asked Yaras to watch out for his family and to keep in touch with him concerning developments that resulted from Miss Lavin's conference with the United States Attorney's Office. Yaras left Patrick at the entrance to either the Eastern or Northwest Orient terminal. He saw Patrick go inside the terminal, and then he left. (Tr. 101)

Later that day Patrick called his daughter Sharon, told her he was going out of town, and said that if anything happened she should call Yaras. (Tr. 116)

Anna Lavin called Peter Vaira, the Chief of the Chicago Strike Force, as soon as she arrived at her office on Monday morning, February 11. An appointment was made for 11 a.m. She met with Vaira at that time; to the best of her recollection, her office associate, Edward Calihan, was present during this meeting. During the meeting she asked Vaira to "please tell your witness to stop bothering my client." (Tr. 134) She did not "think [she] had to identify his witness as Ronnie O'Hara because we both know [sic] of whom [she] was speaking." (Tr. 134) She then repeated to Vaira substantially what Patrick had told her the previous day and again asked Vaira to tell O'Hara to stay away from her client. Vaira said: "Do you want me to get a United States Marshal to accompany

him?" (Tr. 134) Miss Lavin told Vaira she did not think Patrick would want that, and she thought that would give the illusion that Patrick was a government informant, which he was not. (Tr. 134-5) She did not regard Vaira's offer as a bona fide offer to protect Patrick and, as a consequence, never communicated this offer to Patrick. (Tr. 143, 147)

During Patrick's absence, some time around the middle of February, his son-in-law, Earl Singer, as was his practice, had occasion to be at the Patrick home. While Singer was in the house, O'Hara rang the doorbell. One of the aunts answered the door. O'Hara asked if Patrick was home. Upon being told that Patrick was not home O'Hara asked again: "Are you sure he's not home?" When the aunt replied that he was not, O'Hara said: "Will you tell Mr. Patrick to get a hold of me, that it not only concerns him but it regards the balance of his family as well." (Tr. 71-3)

Two days later, Singer saw O'Hara driving in the vicinity of the Patrick home. He saw O'Hara again a couple of days later in the vicinity of the Patrick home. Patrick was not in town on either occasion. (Tr. 73)

Yaras saw Patrick somewhere around the 15th or 17th of February. (Tr. 101) At that time he gave Patrick a large manila envelope containing Russo's sister's name, address and phone number and several clippings about O'Hara. (Tr. 102)

Patrick reappeared before the grand jury on February 27. At that time he told the grand jury that O'Hara had been to his family's house and that O'Hara had a reputation as a killer. Upon request of the Department of Justice attorney, he furnished the grand jury with Russo's sister's name, address and telephone number.

(See R. 38-39) At either this grand jury appearance, or a subsequent one, Miss Lavin, who accompanied Patrick to all grand jury appearances and who stood in the hallway outside of the grand jury room while Patrick testified, again requested Mr. Vaira to keep O'Hara away from Mr. Patrick.[4] (Tr. 135-6)

In late February or early March, Singer was at the Patrick home with Patrick. The doorbell rang. Patrick showed unusual nervousness. Singer went to the door, looked through the peephole, and recognized O'Hara. Without opening the door he went back to Patrick and told him O'Hara was at the door. Patrick said not to answer the door, that O'Hara was a killer who could harm the family. Patrick was very nervous at this time. He made Singer nervous. (Tr. 75-6)

One evening in the late fall or very early winter of 1974, O'Hara came to the Patrick house again. When Sharon Patrick answered the doorbell he told her he was looking for her father. Sharon said he was not home. O'Hara replied: "Well, what's going on? Is he trying to duck me? If he is, tell him to cut it out, otherwise there is going to be a lot of heartache for all of you." Although disturbed by this, Sharon said she would give her father the message and closed the door. (Tr. 116)

Later that night Patrick called his daughter. She told him O'Hara had come to the house, was looking for him, and had said that, if he didn't reach him, they were

[4] Because Miss Lavin recalled advising Vaira that O'Hara had been in contact with Patrick's daughter Sharon (Tr. 136), it is most probable that this conversation between Miss Lavin and Mr. Vaira occurred on December 17, 1974. (See, *infra,* App. 33)

all going to have a lot of heartache. Patrick became angry that Sharon had answered the door when he had previously told her not to do so. (Tr. 117)

Patrick testified before the grand jury again on December 17.[5] He was accompanied by Anna Lavin. As previously recited (see, *supra,* App. 32, note 4), Miss Lavin advised Vaira that O'Hara had been to see Patrick.

O'Hara was indicted in January, 1975. Two counts of the three-count indictment (G.Ex. 4) charged, generally, that O'Hara failed to report as income certain monies received in 1968 and 1969 from Patrick and one Benny Epstein, deceased. This indictment was assigned to Judge Marshall for trial. (R. 3, 4)

In May 1975, O'Hara again came to the Patrick house. (Tr. 117) When Sharon automatically opened the door, O'Hara said he wanted to talk to her father. Sharon told O'Hara that her father wasn't there. O'Hara said: "Either I see your father before my case goes to trial or you are all going to suffer, and you tell him that, and tell him not to forget it." (Tr. 117-18)

Patrick called his daughter that night, as he always did. She told him O'Hara had been there and what he had said. Patrick told her not to open the door again under any circumstances, to keep her car in the garage, and to let someone know where she was at all times. (Tr. 118-19) Patrick also told her he wanted her to see Miss Lavin with him within the next few days. (Tr. 119) Subsequent

[5] As a result of Patrick's three immunized grand jury appearances, the Internal Revenue Service commenced proceedings against Patrick to collect substantial taxes which it claimed he owed as a result of wagering activities. See *Patrick* v. *United States,* 524 F.2d 1109 (7th Cir. 1975).

to this phone conversation, Sharon observed that her father was "very uptight and very shaky and very upset * * * *" (Tr. 121)

Patrick and his daughter met with Miss Lavin at the end of May.[6] or beginning of June. Sharon told Miss Lavin what had occurred during O'Hara's last visit. (Tr. 120, 137)

On June 5, Miss Lavin met with Mr. Henderson, one of the prosecutors in the O'Hara case. She "indicated that Mr. Patrick was not too enthusiastic about testifying." (Tr. 138) Henderson said that Patrick was not that important as the government had O'Hara on the third count.

Subsequently, Miss Lavin agreed to accept service of a subpoena for Patrick. One of the prosecutors asked if Patrick would consent to being "pre-tried" for the case. After checking with Patrick, Miss Lavin told the prosecutors he would not, but she would like to speak to them. Later that day she saw Mr. Henderson and told him the government should prepare for the contingency that Patrick would assert the Fifth Amendment and refuse to testify. (Tr. 140) Henderson said something about Patrick's going to jail, and Miss Lavin replied "there are worse things than going to jail." At that point, Assistant Department of Justice Attorney Ward joined them and Miss Lavin repeated her earlier conversation with Henderson. (Tr. 140)

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[6] Yaras and Calihan were present but were not parties to the conversation which took place at this meeting. (Tr. 117, 119-20)